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# preme Court of the United States.

OCTOBER TERM, 1892.

No. 57.

JOVITE CAU,
*Plaintiff in Error,*
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

# RIEF FOR THE TEXAS AND PACIFIC RAILWAY COMPANY.

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*For Texas and Pacific Ry. Co.*

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# Supreme Court of the United States,

OCTOBER TERM, 1903.

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JOVITE CAU,
Plaintiff in Error,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

## BRIEF FOR THE TEXAS AND PACIFIC RAILWAY COMPANY.

This action was brought in the Civil District Court for the Parish of Orleans, and thence removed to the United States Circuit Court for the Eastern District of Louisiana.

It was brought to recover the value of certain cotton alleged to have been delivered to the defendant at Texarkana, Texas, for carriage from that place to the City of New Orleans, and which it was claimed was destroyed by fire after it had come into possession of the railway company as a common carrier and after it had issued its bills of lading to carry the same.

Tr., pages 2 and 3.

The plaintiff in his petition referred to the fire clause in the bills of lading, being clause No. 3, providing that neither The Texas and Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to, or destruction of, said cotton by fire (Tr., pp. 19, 22, 25 and 27); but he averred that he did not receive any consideration from the railway company for such limitation of its common law liability and, further, that the clause was not binding upon him because the destruction of the cotton was due to the negligence of the railway company, and also because the cotton was received by the railway company prior to its issuance of the bills of lading and it was claimed that the railway company was without authority, after the receipt of the cotton, to limit its liability (Tr., p. 3).

The answer and amended answer of The Texas and Pacific Railway Company, found at pages 9 and 10, after the plea of the general issue, avers that the conton involved in the case was received under bills of lading in the possession of the plaintiff, and to which reference is made, and admits that such cotton was destroyed by fire at the time and place alleged in plaintiff's petition ; but it alleges that the bills of lading aforesaid evidencing the contracts between the parties and expressing the terms and conditions upon which the cotton was to be trasported by the defendant railway, contained the express stipulation, among others, that this defendant shall not be liable for the loss of, or damage to, said cotton by fire, and defendant expressly claimed and pleaded the benefit of this exception as well as of all other stipulations and conditions in the bills of lading contained.

The defendant further averred that the plaintiff had

no real or substantial interest in the subject matter of the suit, inasmuch as prior to the institution of the suit he had parted with all his right, title, and interest and to any claim or demand that for any reason he might have had against the defendant in the premises, to certain insurance company or companies.

The case was tried before a jury, and the five bills of exceptions (pp. 14–54) purport to contain the testimony in the cause.

The transcript is not very well made up, as for example, at pages 29–54, we have some answers to interrogatories without the interrogatories themselves. However, there is quite enough in the record to justify the affirmance of the judgment of the Court of Appeals, and of the court of first instance.

On motion of counsel for the defendant railway company, the Court of first instance directed a verdict in favor of the defendant, and refused to give certain instructions to the jury asked for on behalf of the plaintiff, which will be referred to hereafter in this brief (p. 11). The plaintiff moved for a new trial (p. 11), and Judge PARLANGE, who presided at the trial, denied the motion for a new trial for written reasons found at pages 58–60, and judgment was rendered upon the verdict in favor of the defendant railway company dismissing the suit with costs (p. 14; see, also, below, p. 20).

Thereupon, the plaintiff removed the cause by writ of error to the United States Circuit Court of Appeals, where a judgment was rendered January 7, 1902, affirming the judgment of the lower Court (p. 61). The opinion of the Court of Appeals is found at pages 63-4; see, also, below, p. 22).

Thereupon, the plaintiff removed the cause to this

Court by writ of error (p. 66), and filed assignments of error, which will be considered in the order pursued in plaintiff's brief.

## Evidence.

Plaintiffs introduced in evidence the four bills of lading issued and covering the cotton shipped, the value of which is herein sued for (pp. 18–28). Each of the bills of lading contain a stipulation exempting the carrier from liability for damage to or destruction of the cotton by fire (p. 22).

Plaintiff introduced the deposition of Geo. West (p. 29), who stated that he was superintendent of the Union Compress Company at Texarkana; that the 110 bales of cotton were destroyed by fire *at the compress;* that the cotton was covered by insurance carried by the Union Compress Company in favor of the transportation companies; this insurance covered only *the legal liability of the carrier.* See form for such insurance (pp. 32, 48).

The deposition of F. W. Offenhauser was read (p. 30). He testified in effect that he knew nothing of the particular facts concerning this shipment. He testified to the practice or course of dealing of the Union Compress Company to the effect that it takes out insurance for the benefit and in the name of each railroad compressing cotton at their press; that this rule applied to all cotton coming into the possession of the compress company for account of the railroads.

V. W. Pons was then sworn and testified for plaintiff (p. 34), that he was agent of the plaintiff who contracted for and made the shipment in question. The

essence of his testimony is as follows: That he inquired of the agent of the railway company the rate on cotton from Texarkana to New Orleans; that the agent told him there was one rate of 60 cents. He procured from the agent blank bills of lading; that the bills of lading were filled out at his office, all except the signature by its agent, and that they were then carried to the office of the railway company and there signed by the agent. He states that the railway company did not pay him anything for the fire exemption; that he did not know that such exemption was in these particular bills of lading; that he did not ask the privilege of shipping the cotton in any other way than under the special contract evidenced by the bills of lading; that he expected to ship it in the regular way and wanted the bills of lading so that he could utilize them by drawing money on them through the bank; that no other character of shipment than that under special contract was talked of between him and the agent. This witness testified to having obtained a tariff sheet from another railroad, but which purported also to be the tariff sheet of the defendant railway company. This tariff sheet was introduced in evidence (p. 17), and showed the rate to be 60 cents, as stated by the agent. This is for depot delivery. Shipside delivery is stated to be 63 cents.

It appears from a provision contained in the tariff sheet that New Orleans shipside rate is to be used only as a basis in arriving at through rates on cotton for export, and that no contract will be made on bill of lading for New Orleans shipside delivery.

Witness further testified that the cotton was destroyed by fire while at the compress after issuance of bills of lading.

**Neither he nor any other witness testified to the circumstances under which the cotton caught fire and was destroyed. There was no pretense whatever that the fire was caused by any fault or negligence on the part of the defendant railway company.**

The above constitutes practically all the evidence introduced by the plaintiff to support his case, and from this statement it will be seen that the sole issue on the trial was one of law, namely: whether the fire exemption contained in the several bills of lading was valid and binding upon plaintiff in error, or, to state the contention in another form, whether such exemption provision became nullified and void by reason of the facts shown on the trial.

The contention of plaintiff in error is that the clause in each of the bills of lading exempting the carrier from liability for damage or destruction of the cotton by fire has no binding effect or legal force. This legal proposition is rested upon the theory that no option was extended to the shipper of shipping the cotton upon any other terms than that contained in the bill of lading, and that no consideration was paid by the carrier to the shipper for such exemption from liability on account of damage or destruction by fire.

In answer to this contention and in support of the judgment in our favor, we submit :

## I.

**A common carrier may limit its liability, as it exists at common law by special contract of shipment assented to by the shipper, except as against its own negligence.**

This proposition has ceased to be questioned since the decision by the Supreme Court of the United States, of the cases of

New Jersey Steam Navigation Co. vs. Merchant's Bank, 6 Howard, 344.
York vs. Central R. R. Co., 3 Wallace, 107.
Clark vs. Barnwell, 12 Howard, 272, 280.
Transportation Co. vs. Downer, 11 Wall., 129, 134.
R. R. vs. Reese, 10 Wall., 176–190.

Such limitation or diminution of the carrier's liability cannot be effected by mere notice or advertisement, but must be stipulated for in the contract of shipment; and when such limitation is stipulated for in the contract of shipment entered into by and between the carrier and the shipper, it is binding and effectual.

In the case of Railroad Company vs. Mfg. Co., 16 Wallace, 328, the Supreme Court says:

"Whether a carrier when charged upon his common law responsibility can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of The New Jersey Steam Navigation Company v. The Merchants' Bank, and York Company v. Central Railroad. In both these cases the right of the carrier to restrict or diminish his general liability by special contract, which does not cover losses by negligence or misconduct, received the sanction of this court. In the former case the effect of a general notice by the carrier seeking to

extinguish his peculiar liability was also considered, and although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject.

" In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said : ' It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not, be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.' "

The limitation of the carrier's liability in this case against damage or destruction of the cotton by fire was expressly stipulated for in the contract of shipment and does not rest upon any notice or advertisement to shippers generally. If the right exists to limit the carrier's liability against damage or destruction of the cotton by fire, as has been expressly determined, then this right was exercised in this shipment in a manner which has received the sanction of the highest judicial tribunal of this country and given full legal force and effect.

## II.

**As stated in the preceding proposition, exemption from liability for damage or destruction of the cotton shipped stipulated for in the special contracts of shipment did not exempt the carrier from liability for damage or destruction by fire resulting from its own negligence, but had the effect to make it encumbent upon the shipper to show that the fire damaging or destroying the cotton resulted from the negligence of the carrier before liability would attach on account of such damage or destruction. In other words, it being shown that such exemption was stipulated for in the special contract of shipment, and that the cotton shipped was damaged or destroyed by fire, no presumption of negligence would arise against the carrier, and in order to recover, the plaintiff would have to show that the damage or loss was caused by the negligence of the carrier.**

In the case of Transportation Company vs. Downer, 11 Wall., 133–4, it is expressly held by this Court that where loss is shown to have been within the terms of exemption stipulated for in the contract of shipment, the burden of showing that the loss resulted from the negligence of the carrier rested with the plaintiff. The trial Court there refused a special charge to this effect, and the case was reversed upon that error.

The case of Platt vs. Richmond, etc., R. R. Co., 108

N. Y., 361, involves a fire exemption clause in a bill of lading covering the shipment of cotton. The Court of Appeals held that the stipulations in the contract of shipment were binding upon the shipper, and that the cotton having been destroyed by fire, the company would only become liable upon it being shown that the company was guilty of negligence causing the loss. The burden of showing such negligence was held to be upon the shipper. In the opinion of the Court it is said :

"Theretofore, the bills of lading having been sufficiently proved, and it having been shown that the cotton was destroyed by fire, the burden was upon the plaintiff to establish that the fire was occasioned and the cotton destroyed by the *fraud or gross negligence* of the defendant." (The italicised words were those used in the contract.)

Not only is this a sound proposition of law, but the contract of shipment in question contained a stipulation covering this feature of the case. It is as follows :

"It is further agreed that in case said cotton is found at the point of delivery to have been injured by any of the excepted clauses specified in this bill of lading the burden of proof shall be upon the owner of such cotton or claimant to establish that such injury resulted from the fault of the carrier."

## III.

**Where the shipment is made under special contract the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire, and it is not necessary that there should be a separate consideration moving from the carrier to the shipper for each provision or stipulation contained in the special contract of shipment. The obligation of the carrier to transport the property shipped is sufficient consideration to support the contract of shipment in its entirety.**

In the case of York Company vs. Central Railroad, 3 Wall., 113, cotton was shipped under a special contract of shipment containing exemption from damage or destruction by fire. The carrier was sued for the loss and it was contended that there was no consideration for such exemption. In treating of this proposition the Court said:

"The second proposition is answered by the fact there is no evidence that a consideration was not given for the stipulation. The company probably had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. *Be this as it may, the consideration expressed was sufficient to support the entire contract made.*"

It will be seen that independent of any question of whether there was any separate or specific consideration for the exemption, the Court held that the con-

sideration expressed, to-wit: the obligation to transport, was sufficient to support the *entire contract* of shipment. The agreements were mutual. This conclusion logically and necessarily followed from the principles laid down in a preceding paragraph of the opinion as follows (*Ib.*, p. 112) :

"Nor do we perceive any good reason or principle why the parties should not be permitted to contract for limited responsibility. The transaction concerns them only. It involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

In other words, the shipment is not made under the common law liability of a carrier; the parties themselves have chosen that the shipment shall be made under special contract embodying the terms of shipment. The shipper, for good reasons, chooses to ship under special contract arrangement, rather than under the terms which the law itself would impose in the absence of a special contract. The contracting parties may agree upon such terms as they see fit, subject to the limitations that the carrier shall not exempt himself from its own wrong or negligence, and subject to such statutory provisions, if any, as may have relevancy. Under these principles, it is manifest that the expressed consideration in the contract will be sufficient to support it in its entirety. The very written evidence of the contract itself is of special value to the shipper, in that the shipper can utilize it in his banking transactions and obtain money thereon. It is shown by the evidence in this case, and would be

known to the Court aside from the evidence adduced upon the trial, that such bills of lading are so utilized by shippers, especially of cotton, universally.

Again, it will be presumed that in fixing the rate of freight, which was the regular tariff rate in this instance, the rate was fixed with reference to the stipulations in the contract, and that the exemptions from liability therein conceded by the shipper were considered and compensation in the way of reduced charges allowed to such shipper on account of such exemptions. Such is the holding in the York case above cited, and in Hutchinson on Carriers, Sec. 278, second edition, the proposition is stated as follows :

" The law, therefore, will presume that, in fixing the amount of compensation which he (the carrier) is to receive, something has been allowed to his employer (the shipper) in the way of a reduced rate as a consideration to him for agreeing to reduce the responsibility on the part of the carrier, * * * but there is no necessity for resorting to any such presumption, the parties being left free to make their own contract, and, having agreed that in consideration of the payment of a certain price by one, certain services upon stipulated terms as to the responsibility shall be performed by the other, neither can allege that as to him there was no consideration. Such is the general rule as to contracts, and no reason is seen why it should not apply to those between carriers and their employees so long as they are permitted to make their own terms."

In Nelson vs. Hudson River Railroad Company, 48 N. Y., 498, this doctrine was enforced.

In no well-considered case with which we are familiar has it ever been held that the fire exemption contained in a special contract of shipment was not binding upon the shipper upon the ground that no specific consideration was shown to have been paid by or moved from the carrier to the shipper. There are cases

wherein it is stated that a consideration must exist for such exemption. It is elementary that there must be a consideration to support a contract, and such expressions are sound in the general sense, but in no case known to us has it been held necessary that each limitation upon the common law liability of the carrier must be shown to have supporting it a specific and independent consideration moving from the carter to the shipper. The great body of the commerce of this country is transported by common carriers upon special contracts of shipment similar to the one in question, and these contracts have come before the courts of the country for adjudication constantly, and yet in no case where the contract has been entered into voluntarily, free from circumstances of fraud, coercion and duress, has such exemption been stricken down upon the theory that there was no special consideration to support them.

The evidence shows in this case that the shipment was made upon the regular tariff rate, evidently based upon the terms contained in the contract of shipment and if the decisions of the Supreme Court of the United States are to stand, this contract must be upheld in its entirety as supported by sufficient consideration.

Again, as said in the York case cited, *supra*, there is no proof of failure of consideration in this case. It is true that the agent, Pons, who shipped the cotton in question, testified that the railroad company did not *pay* anything for this exemption, but his entire evidence shows that he meant by this that no specific consideration was pointed out to him as being given for this particular exemption. He simply asked the rate of freight and he was

told that there was one rate of sixty cents per hundred pounds from Texarkana to New Orleans. The tariff sheet put in evidence showed two rates, one for delivery at depot, and one for delivery at shipside at New Orleans. It seems from a notation on the tariff sheet that shipside shipment was not to be made, and hence the rate quoted was the tariff rate for the shipment intended. It is further clear from the evidence of the witness Pons, that he intended to make the shipment under special contract by means of which he would be delivered bills of lading. The rate quoted him was the rate fixed for shipments which would be accompanied by the delivery of bills of lading to the shipper. Under its common law liability the carrier would be under no obligation to deliver to the shipper bills of lading. Mr. Pons solicited bills of lading, made them out himself and presented them to the agent for signature. The effect of his testimony is, that he would not have shipped without the delivery of such bills of lading. So that the most that can be said of his testimony touching the question of consideration is that no specific consideration was pointed out to him or paid to him for the fire exemption clause contained in the bills of lading. Under either of the propositions announced in the York case, the plaintiff must, therefore, fail in this suit, because:

1. There was no evidence showing want of consideration; and

2. No specific consideration for the particular clause in question was necessary to make the contract valid and binding, but the consideration therein expressed was sufficient to support the entire contract.

## IV.

**The issuance of a bill of lading by the carrier and its acceptance by the shipper, creates a contract between the shipper and carrier, and each is bound by the terms of the contract, provided the carrier has resorted to no unfair means of deception or coercion.**

It is contended by plaintiff in error that the shipper in this instance had no option between a shipment under common law liability of the carrier and under the special contract liability. If this means anything, it means that the contract of shipment was entered into under circumstances either of fraud or coercion amounting to duress.

The evidence shows that the shipper neither requested the shipment to be made under common law liability of the carrier, nor was it his desire that it should be so made ; his desire was that the shipment should be made so as to enable him to obtain the contract of shipment—bill of lading—to the end that he might utilize it in drawing money thereon from the banks. No question of a shipment under common law liability was mentioned between the parties or thought of by them. The shipment was designed to be made in the ordinary way and according to the regular tariff rate. No representation was made by the agent of the carrier to the shipper as to a shipment under common law liability, and this character of shipment was wholly without the contemplation of either party. There is no indication whatever of any deception on the part of the carrier. The regular tariff was quoted

to the shipper, and at his request bills of lading were furnished him, which he filled out and afterwards presented to the carrier's agent for signature.

The witness, Pons, agent of the shipper, says he did not know of the exemption clause in these particular bills of lading, but it was not pretended that he did not have full and ample opportunity to know of such stipulations in the contract. Why should he not know? He had the bills of lading in his possession, filled them out at his leisure and then took them to the agent for signature. He had been engaged in this business of buying and shipping cotton for many years and had never made a shipment except under special contract involving the issuance and delivery of bills of lading.

While some of the cases, in discussing the question of the binding force of such exemptions in bills of lading, use the expression that the option must be given to the shipper to ship either under common law liability or under the special contract, yet none of these cases hold that it is requisite that the carrier must affirmatively state to the shipper that he has such option. The carrier must not prevent or refuse the exercise of the option, but it is nowhere held that it must take the initiative and instruct the shipper that he has an option and extend to him the privilege of exercising it.

Hutchison on Carriers, at Section 240, states the principle in this language:

"Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as evidence of the receipt of

the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk."

In Germania Fire Insurance Company *et al.* vs. M. & C. R. R. Co., 72 N. Y., 93, it is said :

"As a general rule when goods are delivered to a carrier for transportation, and bill of lading or receipt is delivered to the shipper, he is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms and resort cannot be had to prior parol negotiations to vary them (Long v. Central R. R. Co., 50 N. Y., 76). Neither can he set up ignorance of its contents (Belcher v. Dinsmore, 51 N. Y., 166; Stevens v, Liverpool, etc., S. S. Co., 57 N. Y., 1; McGee v. C. & A. R. R. Co., 45 N. Y., 514)."

In the case just quoted from, the bill of lading was delivered after shipment and not objected to, and it was held to bind the shipper by the fire exemption clause therein contained. Such is believed to be the effect of the decisions generally and the principle is uniformly announced by text writers. Not only was the shipper bound to take notice of the stipulations in the contract under the obligations imposed by law upon him, but the contract itself expressly imposed that obligation. In the bills of lading this provision is to be found :

"9. That the acceptance of the bill of lading shall be deemed conclusive proof of the assent of the owner of said cotton and all of the terms and conditions written or printed hereon."

Again, we submit that no such issue as that the contract was procured by deception, fraud or coercion is

raised by the pleadings in this case. The plaintiff's allegations nowhere intimate that any unfair means was adopted by the railway company in order to procure his assent to the special contract of shipment, or that he was in any way coerced into assenting to such contract. It is submitted that such an issue, nullifying the terms of the contract sued on, must be specially pleaded before it could properly arise in the case.

## V.

**The propositions heretofore urged, which are supported, as we contend, by reason and authority, meet every phase of the legal contentions made by the plaintiff in error upon the trial of this case in the Court below.**

In the last analysis the contention is that the carrier should not be exempted from loss by fire not occurring through its negligence, because the carrier did not name and pay a specific consideration for such exemption, and because the carrier did not expressly notify the shipper of his legal option to make the shipment under the common law liability, or under the special contract arrangement. There is nothing else to the case, and if the fire exemption clause is to be stricken down this must be done upon one or both of the grounds just stated. There is no pretense of evidence that the fire occurred through the negligence of the railroad company.

**Judge Parlange, the distinguished Judge who tried the case in the court of first instance, very clearly and forcefully presents the only questions involved, in his opinion setting forth the reasons for refusing a new trial as follows** (p. 58):

"The sole question in this case is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier.

"The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the 'fire clause.' Furthermore, it was proven that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office, and in his own time, filled them and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the 'fire clause.' Shippers have been held bound by the 'fire clause' in a bill of lading, even when they claimed that they did not know that the clause was in the bill of lading, provided they were afforded a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held, under the circumstances, not to avail the shipper. But, of course, the present cause is one in which, as matter of fact, the shipper knew or must be held to have known that the bill of lading contained the 'fire clause.' **I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier.**

"The case of York Co. vs. Central R. R., 3 Wall., 107, was a stronger case against the carrier than the present case. It turned like the present case, upon the acceptance of the bill of lading by the shipper; but it was complicated by the fact that the shipper had not examined the bill and had no authority from his

principal to agree to the 'fire clause.' Yet the Supreme Court held that the 'fire clause' was valid.

"That in the present case the 'fire clause' is binding on the shipper, I consider to be clear.

"See: York Co. v. Central R. R., *supra*;
"Platt v. Richmond, &c., R. R., 108 N. Y.,
"358;
"Germania, &c., Co. v. M., &c., R. R. Co.,
"72 N. Y., 90;
"Nelson v. H., &c., R. R., 48 N. Y., 498;
"Hutchinson on Carrier, 2d Ed., Sec. 278,
"specially the latter part thereof.

"In the same work, Sec. 240, it is said: 'Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common-law liability of the carrier. He knows, moreover, that bills of lading are constantly given, not only as the evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this, he cannot be willfully blind and plead ignorance when it was his duty to know, and knowing in such cases is assenting. If it was his intention to hold the carrier to his common-law liability, he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services and risk.' See cases there cited.

"See same work as to limitation of carrier's liability by contract, Sec. 225 *et seq.*

"Limitation of liability contained in a bill of lading accepted by shipper is binding upon him (Wood on R. R., Minor's Edition of 1894, Vol. 3, Sec. 425, pp. 1881, 1882, and cases there cited).

"In the United States the rule is generally recognized that acceptance by the shipper of a bill of lading containing a limitation of the carrier's liability is binding on the shipper when the limitation is not illegal or unreasonable; and the shipper is conclusively presumed to have read and assented to the provisions of the bill of lading (see Amer. & Eng. Enc. Law (2d edition), Verbis 'Carriers of Goods,' Vol. 5, pp. 293 and 294 and cases there cited).

"A further citation of authorities on the point is deemed useless.

"Of course it is clear that on the question of a carrier's liability the Federal Courts follow their own

jurisprudence. Authorities need not be cited on this point.

" The motion for a new trial must be refused."

As heretofore indicated, there is no pretense that there was any evidence adduced upon the trial raising the issue of negligence on the part of the railway company in connection with the fire which destroyed the cotton. The only question is validity and binding force of the exemption clause, and we respectfully submit that on reason and authority that clause in the bills of lading is binding and effectual and that the Court, therefore, properly instructed a verdict for the defendant.

**We consider as sound the unanimous Opinion of the United States Circuit Court of Appeals affirming the judgment rendered by Judge Parlange, as follows** (Record, p. 63) :

" By the Court : This was an action by the plaintiff in error to recover the value of certain cotton delivered to the defendant in error, to be transported from Texarkana, Texas, to the port of New Orleans, Louisiana, at an agreed charge for freight of sixty cents per hundred pounds. The petition alleged that, in evidence of the contract, the company delivered to the plaintiff in error, its certain bills of lading ; that while the bales of cotton were awaiting further shipment, but after they had been received by the railroad company as a common carrier and were in its possession as such, and after it had issued its bills of lading to carry the same, the whole of the cotton was destroyed by fire. The petition alleged further that by the third clause of the bills of lading the railway company attempted to limit its liability as a common carrier, declaring that it should not be liable for any damage to or destruction of the cotton caused by fire ; that this clause is wholly inoperative, null and void against the petitioner, on the following grounds : (1) that plaintiff did not receive any consideration from the railway company for

such limitation of its common-law liability ; (2) that the destruction of the cotton by fire was due to, and caused by the negligence of the company, its agents and servants ; (3) that the cotton was received by the railway company prior to the issuance of the bills of lading, and it was without authority after the receipt of the cotton as a carrier to limit its liability under the common law. The answer, besides the general issue, set up specially the terms of the third clause of the bills of lading, which so far as necessary to recite expressed 'that neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damage to or destruction of said cotton by fire.' The case came on for trial, and the evidence having been closed counsel for the defendant moved the Court to direct a verdict in favor of the defendant, which motion was granted, and the jury, under the direction of the judge returned their verdict, 'We the jury find a verdict in favor of the defendant;' upon which judgment was duly entered. In acting on the plaintiff's motion for a new trial the learned Judge of the Circuit Court said :

"The sole question in this cause is whether the clause in the bill of lading exempting the carrier from liability for loss by fire is binding on the plaintiff. No negligence is charged against the carrier. The shipment was made by the plaintiff's agent, an intelligent and experienced buyer and shipper of cotton. He is presumed to have known the law and to have been aware that the carrier, if he so desired, was compelled to take the freight under its common law liability, without the fire clause. Furthermore, it was proved that prior to the shipment plaintiff's agent called for blank bills of lading, took them to his office and in his own time filled them, and then presented them for signature by the carrier. This fact, together with the general knowledge which the plaintiff's agent must have had from his previous experience in shipping cotton, makes it certain that as matter of fact the plaintiff's agent knew of and assented to the fire clause. Shippers have been held bound by the fire clause in a bill of lading even when they claimed that they did not know that the clause was in the bill of lading, provided they were offered a full and fair opportunity to acquaint themselves with the contents of the bill of lading. Failure to read the bill of lading has been held under such circumstances, not to avail the shipper. But, of

course, the present clause is one in which as matter of fact the shipper knew or must be held to have known that the bill of lading contained the fire clause. I am clear that there is nothing in the evidence which would invalidate the bill of lading for duress, concealment, fraud or misrepresentation by the carrier."

"So far as it affects this case the statement of the law embraced in the foregoing extract from the trial judge's opinion is fully supported by the leading case of York Company v. Central Railroad, 70 U. S., 107, which has been cited with approval by the Supreme Court as late as the case of Queen of the Pacific, 180 U. S., 49.

**"We have carefully examined the record submitted to us on this hearing, and concur in the view taken by the trial judge that there is nothing in the evidence which would invalidate the bills of lading for duress, concealment, fraud or misrepresentation by the carrier.**

"The judgment of the Circuit Court is, therefore, affirmed" (pp. 63, 64).

## VI.

**It seems to be now intimated in the brief filed by plaintiff in this Court that the burden was on the defendant railway on the trial to establish by affirmative testimony the fact that the fire in the Union Compress was not the fault of the railway company.**

This contention of the plaintiff is in direct contravention of the doctrine which has been laid down by the Supreme Court of the United States for many years; which is founded on elementary rules of law and justice; and which has been followed by our leading State Courts. That doctrine declares that when it is made to appear that the loss of the goods was caused

by one of the perils excepted against, the burden is then shifted on the plaintiff to show, if he can, that it was, nevertheless, caused by the neglect of the carrier.

Clark vs. Barnwell, 12 Howard, 272, 280.
R. R. vs. Reeves, 10 Wallace, 176, 190.
Trans. Co. vs. Downer, 11 Wallace, 129, 134.

We submit that the theories of the plaintiff, at pages 24 and 25 of his brief, as to the effect of the exception against loss by fire in this respect are mistaken. The plaintiff's agent was sojourning in Texarkana buying cotton. He knew the Union Compress, the course of business there, and the risks that attended the compressing of cotton. The cotton was burned there. If there was any neglect by the railway company it would have been easy for plaintiff, not only to make the vague allegation in his petition, but to prove neglect. The fact is that there was no neglect on the part of the railway company.

And we may here note, if need be, an apparent misapprehension on the part of plaintiff as to the jurisprudence of Louisiana in the matter of *this burden of proof*. The case of Berge vs. The Texas and Pacific Ry. Co., 37 An., 470, does not throw the onus on defendant here on the question of neglect. The Supreme Court of Louisiana, from early times, has held consistently the same doctrine laid down by the Supreme Court of the United States and has quoted the decisions of the latter Court in support of that view.

Price vs. Uriel, 10 An., 413.
Thomas vs. Morning Glory, 13 An., 269, 270.
New Orleans Ins. Co. vs. N. O. &c., R. R. Co., 20 An., 303.

We might note here also another misapprehension in the plaintiff's brief. *The railway company was not insured* on this cotton in any such general sense as seems to be implied by plaintiff. The insurance taken out by the compress company for the railway company only covered cotton for which the railway company should be legally liable for loss or damage by fire while contained on compress platforms and in cars on switches adjacent thereto, situate Texarkana, Texas (pp. 32, 48). The railway company cannot collect any insurance money under such circumstances unless it is held liable in this cause as carrier; and it has not been held liable, but, on the contrary, has been exonerated by two Courts. Nor does it hold any fund for plaintiff or owe him any duty in the matter of insurance. The question of insurance seems, therefore, to be irrelevant here.

It may also be pointed out that the plaintiff in his brief has made some errors in regard to the contents and effect of the testimony in the cause, and especially with respect to the witness, Pons. The testimony of Pons is not long, and the Court will examine it with its usual care. We submit that we have correctly stated the substance of it in the foregoing summary of the evidence. And on this point we may also refer to the opinion of the trial Judge *(ante,* p. 20) and of the Court of Appeals in their estimate of the facts *(ante,* p. 22).

In the light of the foregoing discussion and of the evidence given at the trial, it will be seen that each of the four special instructions asked by the plaintiff, was rightfully refused, either because *(a)* it had no foundation in the testimony or *(b)* was inapplicable to

the case, or *(c)* laid down an erroneous principle of law.

We submit that the judgment should be affirmed.

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